

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Paula Hughes, :
Petitioner :
v. :
: No. 1723 C.D. 2010
: Submitted: December 10, 2010
Workers' Compensation Appeal :
Board (Weis Markets, Inc.), :
Respondent :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI

FILED: January 5, 2011

Paula Hughes (Petitioner) appeals from the order of the Workers' Compensation Appeal Board (Board) affirming the decision of the Workers' Compensation Judge (WCJ) granting in part her claim petition. For the reasons that follow, we affirm.

This case has a lengthy procedural history. In 2004, Petitioner filed a claim petition alleging that on March 21, 2004, she sustained work-related injuries to her back, right shoulder and right hand following a fall while in the scope and course of her employment as a baker with Weis Markets, Inc. (Employer). In 2005, the WCJ granted Petitioner's claim petition in part finding that she did suffer a disabling

rotator cuff injury that required surgery, but that Petitioner's carpal tunnel syndrome was not a work-related injury. The WCJ ordered Employer to pay Petitioner temporary total disability benefits for a time in 2004 and temporary partial disability benefits thereafter.

Two issues that came up during the proceedings before the WCJ are relevant to this appeal. First, Petitioner's deposition was taken and her attorney ordered a transcript of the deposition. While he was willing to pay for Petitioner's deposition transcript, the court reporting service would not provide him with a copy of Petitioner's deposition transcript unless he paid both for that deposition and for unpaid deposition transcripts in two unrelated cases.¹ Following this, Petitioner's attorney and the WCJ engaged in correspondence via letters concerning this issue in which the attorney asked that the court reporting service be ordered to provide him with a copy of the transcript or, alternatively, that a different court reporter be used. The WCJ denied this relief, stating that all the attorney had to do was pay his bills and he would receive the transcript. These letters are included in the reproduced record (pp. 1a-17a), but neither they nor any evidence concerning this issue are part of the certified record.

Second, Petitioner objected to some of the deposition testimony of S. Ross Noble, M.D. (Dr. Noble), who testified for Employer regarding Petitioner's alleged carpal tunnel syndrome. Dr. Noble's testimony was, to the effect, that

¹ A copy of Petitioner's deposition transcript cost \$86.90, and the unpaid bills on the previous two deposition transcripts cost \$215.42.

Petitioner did have a certain degree of carpal tunnel syndrome but that it was not related to her employment. At one point, Dr. Noble opined that factors such as Petitioner's age and sex factored into her carpal tunnel syndrome, and that if it had come from repetitive work, it would have been in both hands and not in just one. Petitioner objected when Dr. Noble used these specific justifications to support his opinion because they were not found in his expert report, but her objections were overruled. Petitioner ultimately called her own expert witness to testify on this matter, but the WCJ credited Dr. Noble's testimony.

Following the WCJ's decision, Petitioner appealed to the Board. With regard to the transcript issue, Petitioner argued that the WCJ violated her due process and equal protection rights by failing to direct the court reporting service to provide her a transcript without her attorney having to pay for the two previous transcripts in the unrelated cases. The Board refused to consider this argument, stating that review of constitutional issues is outside of its jurisdiction. With regard to Dr. Noble's testimony, Petitioner argued that the WCJ erred by permitting Dr. Noble to offer testimony not contained in his expert report, in effect, ambushing Petitioner. The Board held that the WCJ did not err in allowing Dr. Noble to testify that age and sex were factors that could have contributed to her carpal tunnel syndrome because Petitioner was allowed the opportunity to offer rebuttal testimony, which she did.

With regard to the appeal as a whole, the Board affirmed in all respects except for two issues unrelated to this appeal, which the Board remanded to the WCJ for further consideration. The WCJ then ruled on the remanded issues, and Petitioner again appealed to the Board, which again remanded to the WCJ for consideration of

issues not relevant to this appeal. Following another decision by the WCJ on those remanded issues, Petitioner again appealed to the Board. The Board affirmed in relevant part, holding that the law of the case doctrine precluded it from reversing its earlier decision on the issue of Dr. Noble's testimony, and that Petitioner's constitutional challenges on the issue of the transcript failed because she had notice and an opportunity to be heard and that she was actually just challenging the manner in which the WCJ conducted the hearing, which was within his discretion. This appeal followed.²

On appeal, Petitioner again contends that her due process and equal protection rights were violated because the WCJ refused to order the transcript service to provide Petitioner's transcript to her attorney before he first paid for the two transcripts from the previous unrelated cases. In response, Employer argues that the transcript issue was waived because there is no record evidence concerning it, only letters contained in the reproduced record but not in the original record.

While we cannot condone the WCJ's sanctioning of a court reporting service's refusal to provide a transcript in one proceeding because fees in other cases were not paid, there is no evidence in the original record regarding this issue, only letters that Petitioner's counsel had included in the reproduced record between himself and the WCJ. Evidence not included in the original record that is inserted in

² In reviewing Board decisions, this Court's scope of review is limited to a determination of whether there was an error of law or abuse of discretion committed and whether the WCJ's findings of fact are based upon substantial evidence. *Russell v. Workmen's Compensation Appeal Board (Volkswagen of America)*, 550 A.2d 1364 (Pa. Cmwlth. 1988).

the reproduced record is no evidence at all, and we will not consider it. *Fearon v. Workers' Compensation Appeal Board (Borough of Ashland)*, 827 A.2d 539 (Pa. Cmwlth. 2003). If any material information is omitted from the certified record, a party may seek to supplement the record pursuant to Pa. R.A.P. 1951(b). Because Petitioner has not filed a petition to supplement the record with those letters, we cannot consider them and the issue is waived. *Lord & Taylor v. Workers' Compensation Appeal Board (Bufford)*, 833 A.2d 1223, 1226 (Pa. Cmwlth. 2003).

Petitioner also contends that the WCJ erred by allowing Dr. Noble to provide opinions in his deposition that he did not mention in his expert report, which prevented Petitioner's counsel from consulting with another expert on these issues before conducting cross-examination. Employer argues in response that the issue of Dr. Noble's testimony was waived because Petitioner did not immediately appeal from the Board's first order, instead waiting until the remanded issues had been resolved. Employer further argues that because nothing in the Special Rules of Administrative Practice and Procedure before WCJ's relating to discovery of documents³ require an expert to submit a report, nothing precludes the expert from testifying to matters not included in such a report.

The issue of Dr. Noble's testimony, however, was not waived, as Employer suggests, because it is well-settled that a Board order remanding a case to the WCJ for further action is interlocutory and cannot be appealed until the WCJ has issued his subsequent order. *Shuster v. Workers' Compensation Appeal Board*

³ 34 Pa. Code §§131.61.

(Pennsylvania Human Relations Commission), 745 A.2d 1282 (Pa. Cmwlt. 2000).⁴ Nevertheless, there is no requirement in workers' compensation cases that a medical expert confine himself exactly to the content of his expert report. In *Stech v. Workmen's Compensation Appeal Board (MJS Equipment Company)*, 678 A.2d 1243 (Pa. Cmwlt. 1996), we held that a WCJ did not err by allowing a medical expert to testify in his deposition to causation issues when his report was limited to the worker's employability. Likewise, here, the WCJ did not err by allowing Dr. Noble to testify in his deposition to supplemental alternative explanations for Petitioner's carpal tunnel syndrome that he did not mention in his expert report.

For the foregoing reasons, the order of the Board is affirmed.

DAN PELLEGRINI, JUDGE

⁴ Pennsylvania Rule of Procedure 311(f) does contain exceptions, not relevant to this appeal, in which a party may take an appeal as of right from a Board remand order.

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ORDER

AND NOW, this 5th day of January, 2011, the order of the Workers' Compensation Appeal Board, dated July 28, 2010, is affirmed.

DAN PELLEGRINI, JUDGE